SOAH DOCKET NO. 582-13-4611
TCEQ DOCKET NO. 2013-0657-AIR

APPLICATION OF EXXONMOBIL FOR ISSUANCE OF AIR QUALITY PERMIT NO. 102982 FOR THE CONSTRUCTION OF A NEW ETHYLENE PRODUCTION UNIT AT EXXONMOBIL'S BAYTOWN OLEFINS PLANT, LOCATED IN HARRIS COUNTY, TEXAS	§	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

EXXONMOBIL'S REPLIES TO EXCEPTIONS TO THE PROPOSAL FOR DECISION

Respectfully submitted,

WINSTEAD PC

By: _____

Derek Seal
State Bar No. 00797404

Albert R. Axe
State Bar No. 01457400

401 Congress, Suite 2100
Austin, Texas 78701
Telephone: 512.370.2807
Facsimile: 512.370.2850

ATTORNEYS FOR EXXONMOBIL

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ExxonMobil (the "***Applicant***") files these Replies to Exceptions to the Honorable Administrative Law Judges' (the "***ALJs***'") Proposal for Decision (the "***PFD***") and Proposed Order issued in the above-referenced matter.

I. THE ALJs' PFD AND PROPOSED ORDER ARE BASED ON THE EVIDENTIARY RECORD AND SOUND LEGAL ANALYSIS

Applicant agrees with the exceptions filed by the Texas Commission on Environmental Quality's (the "***TCEQ's***" or "***Commission's***") Executive Director and the exceptions filed by TCEQ's Office of Public Interest Counsel. However, Applicant disagrees with the "Protestants Air Alliance Houston and Sierra Club's Exceptions to the Administrative Law Judges' Proposal for Decision" ("***Exceptions***") filed by the Sierra Club and Air Alliance Houston (the "***Protestants***") as explained more fully herein. Applicant's Replies to Exceptions ("***Replies***") below address the Protestants' Exceptions in the order that Protestants have raised the issues.

Protestants' Exceptions do not raise any new issues for the ALJs or the Commission to consider. Protestants raised the very same points discussed in their Exceptions during the hearing and in their post-hearing briefing to the ALJs. Applicant and the Executive Director have already responded to those points on multiple occasions. The ALJs evaluated the record, rejected Protestants' points, and proposed that the Commission grant the ethylene production unit ("***EPU***") permit application (the "***Application***") and issue the permit to Applicant.

A. THE ALJs CORRECTLY DETERMINED THAT THE APPLICATION IS A MINOR NEW SOURCE REVIEW APPLICATION

1. The ALJs appropriately concluded that PAL6, issued in 2005, included a PAL Cap for PM, PM_{10} and $PM_{2.5}$.

The ALJs' determination that the particulate matter ("***PM***") Plant-wide Applicability Limit ("***PAL***") addresses PM, PM_{10}, and $PM_{2.5}$ is supported by more than the preponderance of evidence in the record. Specifically, the ALJs' proposed Finding of Fact No. 95 states:

> The PM PAL limit in Applicant's PAL6 also includes a $PM_{2.5}$ and a PM_{10} PAL based on TCEQ practice and EPA's Surrogacy Policy. Once a PAL is issued, it remains the federal applicability limit through the term of the 10-year PAL.

In their Exceptions, Protestants do not object to or offer any alternative language to Finding of Fact No. 95. Instead, the Protestants repeat the same arguments which were already addressed by the Applicant's Closing Argument and evaluated in the PFD.[1] The Commission should reject the Protestants' Exceptions that PAL6 does not include a PM_{10}[2] or $PM_{2.5}$ PAL and adopt the ALJs' PFD and Proposed Order. The ALJs' conclusion is correct as demonstrated below in the following ways:

- The record demonstrates that TCEQ appropriately applied EPA's PM_{10} Surrogate Policy for $PM_{2.5}$ when it issued PAL6.
- In 2005, the PM_{10} Surrogate Policy was essential in the absence of $PM_{2.5}$–specific New Source Review ("***NSR***") regulations.
- Setting the PAL is the first step in a PAL-based applicability determination and thus was appropriately covered by the PM_{10} Surrogate Policy in 2005.

The federal guidance and the TCEQ permitting policies implementing the PM_{10} Surrogate Policy were discussed extensively by the Applicant and the Executive Director to

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[1] Applicant's Closing Argument at 12-15; Applicant's Reply to Closing Argument at 18-26; Executive Director's Closing Argument at 4-5; Executive Director's Reply Argument at 4-5; *see also* PFD at 22-33 (summarizing the evidence and providing analyses and conclusions.)

[2] Other than the general objection that PAL6 does not establish a PM_{10} PAL, Protestants' Exceptions make no argument that PAL6 does not include PM_{10} to counter the ALJs' PFD and Proposed Order. Protestants' Exceptions ("***Exceptions***") at 2. Therefore, this brief does not repeat the evidence presented in the Applicant's Closing Argument or the ALJs' PFD conclusion that the PAL6 includes a PM_{10} PAL.

counter the Protestants' claims during the contested case proceedings. These arguments still stand up against the Protestants Exceptions to support the ALJs' conclusion that:

> A preponderance of the evidence demonstrates that PAL6 includes PALs for PM, PM_{10} and, pursuant to the PM Surrogate Policy, $PM_{2.5}$....[T]he ALJs also find that the Commission's PAL6 issuance determinations 8 years ago are not now subject to challenge.[3]

a. The record demonstrates that TCEQ appropriately applied EPA's PM_{10} Surrogate Policy when it issued PAL6.

The ALJs' PFD addressed the PM_{10} Surrogate Policy in a span of 11 pages which evaluated the Protestants' PM_{10} surrogate issues relating to PAL6's PM PAL issued in 2005 and the arguments in support of the Executive Director's use of the PM_{10} Surrogate Policy.[4] As explained and documented in the Executive Director's Closing Argument,[5] the Executive Director's Response to Closing Argument,[6] Applicant's Closing Argument,[7] Applicant's Reply to the Protestants' Closing Argument,[8] the ALJs' conclusion that the preponderance of the evidence demonstrates that PAL6 includes a $PM_{2.5}$ PAL pursuant to the PM_{10} Surrogate Policy is supported by more than a preponderance of evidence in the record.[9]

Despite the ALJs' conclusion that "the Commission's PAL6 issuance determinations 8 years ago are not now subject to challenge,"[10] the Protestants' repeat the same arguments in an attempt to reach back to 2005 and challenge how $PM_{2.5}$ was evaluated when TCEQ issued PAL6. In the Exceptions, the Protestants begin the collateral attack on TCEQ's use of the PM_{10} Surrogate Policy in 2005 with an easy "no evidence presented" claim.[11] As detailed by the ALJs

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3 PFD at 33.
4 PFD at 22 – 33.
5 Executive Director's Closing Argument at 4-5.
6 Executive Director's Response to Closing Argument at 4-5.
7 Applicant's Closing Argument at 12-14.
8 Applicant's Reply to Closing Argument at 18-25. The terms "Applicant's Reply to Closing Argument" and "Applicant's Reply" within this brief both refer to Applicant's Reply to Closing Argument.
9 PFD at 33. To be clear, the Application demonstrated compliance with the $PM_{2.5}$ National Ambient Air Quality Standard (***"NAAQS"***), as stated in the Executive Director's Closing Argument, "...TCEQ did not apply the surrogacy policy during its review of the $PM_{2.5}$ NAAQS for the proposed EPU, and...the Applicant submitted appropriate modeling demonstrating that the proposed emissions from the EPU would not cause an exceedance of the $PM_{2.5}$ NAAQS." Executive Director's Closing Argument at 5.
10 PFD at 33.
11 Exceptions at 4-5.

and summarized below, the record includes extensive support for TCEQ's use of the PM_{10} Surrogate Policy:

- In 2005, the Executive Director relied upon EPA's 1997 PM_{10} Surrogate Policy to establish the PAL for $PM_{2.5}$. To support this statement the ALJs cited the Executive Director's Response to Comments, the Executive Director's Responses to Protestants' Written Discovery Requests, and an EPA Memorandum from John S. Seitz, *Interim Implementation of New Source Review for $PM_{2.5}$*, Oct. 23, 1997.[12]

- The ALJs' decision cites to numerous federal regulations that document the regulatory permitting history of $PM_{2.5}$ and the PM_{10} Surrogate Policy that demonstrate, in fact, that TCEQ had no choice but to implement the PM_{10} Surrogate Policy in 2005, which was before EPA promulgated the $PM_{2.5}$ NSR permitting regulations in 2008.[13]

- The ALJs also cite to prior SOAH decisions supporting the Commission's use of the PM_{10} Surrogate Policy.[14]

- The ALJs concluded that in 2005 the PM PAL calculations for PAL6 included both PM_{10} and $PM_{2.5}$ emissions from then-existing facilities, citing an email from Ben Hurst to the Executive Director providing the calculations used to establish the PM PAL6 limit.[15]

As described above, the Executive Director and Applicant provided federal guidance, regulatory language, state precedent, and emission calculations which support the TCEQ's issuance of the PM PAL using the PM_{10} Surrogate Policy in 2005. The Protestants' claim that

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12 PFD at 23, n. 108.

13 *See, e.g.*, PFD at 24, n. 113 (citing *Implementation of the New Source Review (NSR) Program for Particulate Matter Less than 2.5 Micrometers ($PM_{2.5}$); Final Rule to Repeal Grandfather Provision, **("2011 $PM_{2.5}$ Rule")**, 16* Fed. Reg. 28646, 28654/2-3 (May 18, 2011) (end of the PM_{10} Surrogacy Policy did not create a new basis to argue previously issued permits were not properly issued)); *see also* PFD at 24, n. 117 (citing *Implementation of the New Source Review (NSR) Program for Particulate Matter Less than 2.5 Micrometers ($PM_{2.5}$)*, 73 Fed. Reg 28321, 28341/1 (May 16, 2008)***("2008 $PM_{2.5}$ Rule")***(Initial issuance of $PM_{2.5}$-specific permitting regulations)); PFD at 27, n. 129 (citing *Proposed Rule to Implement the Fine Particle National Ambient Air Quality Standards,* 70 Fed. Reg. 65984, 66044/3 (November 1, 2005)***("2005 $PM_{2.5}$ Proposal")***(explaining how EPA would continue to implement the PM_{10} Surrogate Policy. This proposal was confirmed in the 2008 $PM_{2.5}$ Rule)); PFD at 28, n. 131 (citing *Implementation of the New Source Review (NSR) Program for Particulate Matter Less than 2.5 Micrometers ($PM_{2.5}$); Notice of Proposed Rulemaking to Repeal Grandfathering Provision and End the PM_{10} Surrogate Policy,* 75 Fed. Reg. 6827, 6831/2 (Feb. 11, 2010)***("2010 $PM_{2.5}$ Proposal")***(stating that when EPA initially issued the 1997 PM_{10} Surrogate Policy, "[EPA] did not identify criteria to be applied before the policy could be used for satisfying $PM_{2.5}$ requirements.")).

14 *See* PFD at 28, n. 132 (citing *In re White Stallion Energy Center*, LLC (SOAH Docket No. 582-09-3008; TCEQ Docket No. 2009-0283-AIR) Proposal for Decision at 26 (summarizing the evolution of the PM_{10} Surrogate Policy requirements over time for air permit applications and recognizing that Commissions actions at the time reflected that a demonstration of compliance with the PM_{10} NAAQS demonstrated compliance with the $PM_{2.5}$ NAAQS).

15 PFD at 23, n. 109 (citing EM-107 at 3-4 (December 5, 2012 email response from Ben Hurst at ExxonMobil to Kyle Virr at TCEQ detailing the PM, PM_{10} and $PM_{2.5}$ calculations used to calculate the PAL baseline).

the ALJs' conclusion is not based on any evidence in the record is clearly without merit. In addition, the PM PAL was issued in 2005, over 8 years ago, and is not subject to challenge in the context of this administrative proceeding.[16]

b. In 2005, the PM_{10} Surrogate Policy was essential in the absence of $PM_{2.5}$–specific NSR regulations.

In 1997, EPA established the PM_{10} Surrogate Policy to implement the federal PSD permitting requirements for $PM_{2.5}$.[17] The 1997 memorandum implementing the PM_{10} Surrogate Policy did not apply the PM_{10} Surrogate Policy to only a portion of the PSD permitting program; rather, EPA's PM_{10} Surrogate Policy memorandum addresses how the agency will allow PSD permittees to implement the new $PM_{2.5}$ NAAQS as required by the federal Clean Air Act. The PM_{10} Surrogate Policy memorandum points to "Section 165(a)(1) of the [Clean Air Act that] provides that no new or modified major sources may be constructed without a PSD permit" as a reason to implement the PM_{10} Surrogate Policy for $PM_{2.5}$.[18]

Without citing to any regulatory support, the Protestants' Exceptions now attempt to parse the application of the PM_{10} Surrogate Policy to just PSD "demonstrations" but not PSD permit "limits."[19] This distinction is artificial because the PSD preconstruction program uses permit limits to maintain and protect air quality.[20] As EPA expressly states, the PM_{10} Surrogate Policy should be used to meet the $PM_{2.5}$ PSD permitting requirements:

> This memorandum addresses the interim use of PM_{10} as a surrogate for $PM_{2.5}$ in meeting new source review (NSR) requirements under the Clean Air Act (Act), including the permit programs for prevention of significant deterioration of air quality (PSD).[21]

The Protestants' attempt to apply the PM_{10} Surrogate Policy to just certain building blocks of PSD permits, the demonstrations, but not to the permit limits themselves is nonsensical and unsupported. This revisionist history fails to apply the plain language of the above-quoted

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16 PFD at 33.
17 SC-107 (1997 PM_{10} Surrogate Policy Memorandum).
18 SC 107 at 1.
19 Exceptions at 7.
20 *See, e.g., Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 567-568 (2007)(describing how the Clean Air Act uses PSD permits to give "added protection to air quality.")
21 SC-107 (1997 PM_{10} Surrogate Policy Memorandum).

PM_{10} Surrogate Policy, stating that the PM_{10} Surrogate Policy applies to the PSD permitting program.[22]

The Protestants shift from arguing that the PM_{10} Surrogate Policy does not apply to PSD permits, addressed above, to one that renders the $PM_{2.5}$ analysis "unnecessary" for all PSD regulatory provisions.[23] Far from being unnecessary, the record demonstrates that the $PM_{2.5}$ emissions were in fact evaluated as a part of setting the PM PAL in PAL6.[24] The ALJs have already reached this conclusion.[25]

The Protestants seem to argue that the $PM_{2.5}$ evaluation was "unnecessary" in 2005 because the 2005 PSD regulations (40 C.F.R. § 52.21(b)(23)(i)) did not list a $PM_{2.5 \text{ in } 2005}$.[26] If that were the case, and the PSD regulations did not apply to $PM_{2.5}$, then why would EPA have issued the PM_{10} Surrogate Policy at all? Instead, the PSD regulations are actually more stringent when applied to regulated NSR pollutants not listed in Section 52.2(b)(23). The PSD regulations in 40 C.F.R. § 52.21(b)(23)(ii) state that if a "regulated NSR pollutant" is not listed in Section 52.21(b)(23)(ii) then that regulated NSR pollutant would generate a "significant increase" (and thus be subject to PSD permitting) with any net emission rate increase.[27] In 2005, $PM_{2.5}$ was a "regulated NSR pollutant" but it was not included in the PSD regulations cited above (40 C.F.R. § 52.21(b)(23)(i)."[28]

In its Reply, Applicant explained how the plain language of the PSD regulations defined a significant increase as any net increase for regulated NSR pollutants without a SER, such as $PM_{2.5}$ in 2005.[29] Due to the absence of the $PM_{2.5}$ Major NSR regulations in 2005, TCEQ's only choice was to evaluate $PM_{2.5}$ emissions under the PM_{10} Surrogate Policy. This does not make

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22 Exceptions at 6 (citing PM_{10} Surrogate Policy Memorandum).
23 Exceptions at 7-8.
24 PFD at 23, n. 109 (citing EM-107 at 3-4 (December 5, 2012 email response from Ben Hurst at ExxonMobil to Kyle Virr at TCEQ detailing the PM, PM_{10} and $PM_{2.5}$ calculations used to calculate the PAL 6 baseline).
25 PFD at 2, n. 109.
26 Exceptions at 8.
27 40 C.F.R. § 52.21(b)(23)(ii)(2005).
28 40 C.F.R. § 52.21(b)(50).
29 Applicant's Reply to Closing Argument at 21.

the $PM_{2.5}$ NAAQS evaluation "unnecessary."[30] Rather, the evaluation of PM_{10} was necessary to "serve as a surrogate approach for reducing $PM_{2.5}$ emissions and protecting air quality."[31]

Failing to demonstrate that the $PM_{2.5}$ NAAQS was rendered "unnecessary" by EPA under the PM_{10} Surrogate Policy, the Protestants repeat an issue to which the Executive Director, the Applicant and, most recently, the ALJs' PFD have already responded: whether the PM limit in the PAL maximum emissions rate table ("***MAERT***") addresses PM, PM_{10} and $PM_{2.5}$. The ALJs' conclusion addressed this question head on:

> The [PAL] MAERT refers to PM and PM_{10} as a single line item. TCEQ's use of the 15 tpy SER level for PM_{10}, rather than the 25 SER for PM, confirms that the [PAL] MAERT includes PM and PM_{10}...Further, it logically follows that TCEQ appropriately applied the PM_{10} SER as a surrogate for $PM_{2.5}$ in the issuance of PAL6.[32]

The ALJs' conclusion is supported by the Executive Director's testimony and Response to Comments,[33] the face of the PAL6 permit,[34] and TCEQ permitting practice at the time.[35] In failing to counter, "Mr. Powers [the Protestants' expert] provided no reason why PM and PM_{10} cannot be included in the same permit line-item cap for PM."[36] Neither did Protestants in their Exceptions.[37]

The Protestants' Exceptions repeat prior claims in an attempt to discredit the application of the PM_{10} Surrogate Policy to the 2005 issuance of the PAL6 PM PAL. As discussed above, these claims have already been addressed by the ALJs. The ALJs' conclusion that the PM_{10}

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30 Exceptions at 8-9.

31 *See* 2008 $PM_{2.5}$ Rule, 73 Fed. Reg at 28341/1 (stating that even before implementing a $PM_{2.5}$ state implementation plan, "the $PM_{2.5}$ NAAQS must still be protected"...therefore States may "continue to implement a PM_{10} program as a surrogate to meet the PSD program requirements for $PM_{2.5}$").

32 PFD at 33.

33 *See* PFD at 28 citing ED-36 at 699-700 (Executive Director's Response to Comments, Response 5) ("ExxonMobil is required to operate within the existing PM PAL limit, which include the subsets $PM_{2.5}$ and PM_{10} as indicator pollutants for PM").

34 *See* PFD at 30 citing EM-302 at 53, 60 (ExxonMobil Permit 3452/PAL6, PM PAL footnote 3) (defining PM as "particulate matter, suspended in the atmosphere, including PM_{10}").

35 *See* Tr. at 299 (testimony by EM expert Kevin Brewer of common practice in 2005 for TCEQ permits to group PM and PM_{10} together.)

36 PFD at 30.

37 Exceptions at 9.

Surrogate Policy was a necessary component of the PAL6 PM PAL evaluation is supported by federal guidance and TCEQ permitting practice in place in 2005 when the permit was issued.[38]

c. Setting the PAL is the first step in a PAL-based applicability determination.

As argued in Applicant's Reply, "the applicability determination, including the evaluation of the PAL, is a necessary first step in any permit application."[39] The Protestants' final attempt at invalidating the PM PAL is a tortured argument that misrepresents the ALJs' PFD and claims that the PM_{10} Surrogate Policy could not have been used in 2005 for setting the very heart of any PAL-based applicability determination, the PAL limit itself.[40]

For background, the Applicant's Reply states:

> In over 100 pages of the 2002 Final PAL rule *Federal Register* preamble, EPA never implied nor hinted that the PM_{10} Surrogate Policy, implemented in 1997 and still in effect in 2002, could not be used to establish a PAL for PM_{10} or $PM_{2.5}$ applicability determinations.[41]

In absence of a legal argument to counter this statement, Protestants instead turn to twisting the conclusions in the ALJs' PFD by asserting the red herring argument that the "PAL is not a major NSR Applicability Determination."[42] In the cited portions of the PFD, however, the ALJs are merely making a point that the PAL numerical limit is a critical part of any applicability determination that relies on the PAL regulatory program.

For example, in support of this last ditch argument, the Protestants cite the ALJs' PFD that rephrases the Applicant's argument quoted above by stating "...EPA never implied nor hinted that the PM_{10} Surrogate Policy could not be used for major source applicability determinations, *including PALs*."[43] Likewise, the PFD states that "TCEQ appropriately relied on the federal PM_{10} Surrogate Policy memorandum in making federal applicability determinations,

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38 PFD at 33; ALJs' Proposed Order at 13.

39 Applicant's Reply to Closing Argument at 20.

40 *See* Exceptions at 10 ("Thus, even if the Commission disagrees with Protestant's argument, EPA's PM_{10} Surrogate Policy did not apply to major NSR applicability determinations, it does not follow that the policy was applied in 2005 to make an applicability determination with respect to issuance of Permit No. 3452/PAL6 in 2005").

41 Applicant's Reply to Closing Argument at 20.

42 Exceptions at 9.

43 Exceptions at 9, n. 26 citing PFD at 26-27 (emphasis in original).

including the issuance of PAL6."[44] Despite what Protestants are trying to argue, the PAL is in fact a part of (*and thus included in*) an EPA-approved applicability determination process.

The Protestants' own witness describes how the PAL limits are a key component of any applicability determination using a PAL.[45] "PALs are used as a stream-lined approach for determining major NSR applicability."[46] Mr. Powers continued, "A PAL is used to determine whether a facility should go through major review for permitting actions at an existing major stationary source."[47]

The ALJs' determination that the PM_{10} Surrogate Policy was appropriately applied by TCEQ when establishing the PM PAL for PAL6 is supported by the record as well as EPA's PM_{10} Surrogate Policy guidance. The Protestants' Exceptions only recycle old arguments already addressed by the Executive Director, the Applicant's Closing Argument and the ALJs' PFD and Proposed Order.[48] The Commission therefore should adopt the ALJs' conclusion that "the PM PAL limit in Applicant's PAL6 also includes a $PM_{2.5}$ and a PM_{10} PAL based on TCEQ practice and EPA's Surrogacy Policy."[49]

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[44] Exceptions at 9, n. 26 citing PFD at 28 (emphasis in original).

[45] Applicant maintains that Powers' testimony is not "expert." *See* Applicant's Reply to Closing Argument at 19, 33-34.

[46] SC-100 at 16 (Powers direct).

[47] SC-100 at 16 (Powers direct).

[48] *See* Applicant's Reply to Closing Argument at 21 ("The Executive Director confirmed that in 2005, TCEQ relied upon EPA's 1997 PM_{10} Surrogate Policy memorandum for permits with $PM_{2.5}$ emissions") citing EM-123 at 15 (Executive Director Response to Comments, Response 5) ("ExxonMobil is required to operate within the existing PM PAL limit, which includes the subsets $PM_{2.5}$ and PM_{10} as indicator pollutants for PM"); SC-103 at 17 (Executive Director's Responses to Protestants' Written Discovery Requests, Response to Interrogatory No. 22)("PAL6 was issued in 2005 in accordance with reliance on EPA's PM_{10} Surrogacy Policy, as was appropriate for PM_{10} sources at that time"); *see also* Executive Director's Closing Argument at 4 (stating "When PAL6 was established, using available PM_{10} data was an appropriate surrogate for $PM_{2.5}$"); and *see also* PFD at 22-33 (summarizing the evidence and providing analyses and conclusions).

[49] ALJs' Proposed Order, Finding of Fact 95.

2. The ALJs' proposed finding that Applicant's existing Baytown Olefins Plant (*"BOP"*) site is in compliance with PAL6 is supported by the preponderance of the evidence.

The PFD's 13-page discussion regarding PAL6 compliance is a careful consideration of all evidence presented by the parties.[50] Significantly, the conclusion is in favor of the Executive Director and the Applicant and states that the ALJs:

> [C]onsidered the entirety of the record evidence… Applicant has demonstrated that emissions from the BOP have not exceeded the PM PAL limit in PAL6…[T]he ALJs further conclude, based upon the authorities cited by Applicant, that Protestants challenges are, in major part, an impermissible collateral attack on the validity of the Commission's final order issuing the PAL6 permit 8 years ago.[51]

Protestants do not raise new issues in their Exceptions or even make specific recommendations to the ALJs' PFD or Proposed Order; rather, they seek to rehash the same themes argued throughout the contested case proceedings and addressed by the PFD. The Commission should approve the ALJs' 14-point conclusion in the PFD[52] and the Findings of Fact in the Proposed Order[53] that the Applicant is in compliance with a valid PAL6 issued in 2005 by TCEQ.

The Protestants' basic argument is that out of the entire evidentiary record, a few lines of testimony by TCEQ's permit engineer and Applicant's annual emissions inventory update reports (***"AEIUs"***) conclusively demonstrate noncompliance with Applicant's final PAL permit issued by TCEQ eight years ago.[54] Protestants assert "uncontroverted" legal propositions cited by the ALJs in the PFD[55] but take the propositions out of context and would have the Commission subordinate the evidentiary record and legal precedent to reach the Protestants' desired outcome. Despite ample opportunity, nothing the Protestants have presented during this contested case hearing refutes the overwhelming evidence in the record, and the ALJs'

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50 PFD at 8-21.
51 PFD at 21.
52 PFD at 21-22.
53 Proposed Order at 13, Findings of Fact Nos. 90 – 94.
54 Exceptions at 12, citing SC-106 at 35-36; SC-103 at 2.
55 PFD at 8 (identifying agreement that a PAL imposes a pollutant-specific annual emission limitation in tons per year that is enforceable for all emission units at a major stationary source that emit the PAL pollutant).

conclusions cited above, that Applicant has been and continues to be in compliance with the PM PAL in PAL6 since its inception.

a. Applicant demonstrates compliance with the PM PAL based upon PAL regulations, permitting guidance and PAL 6.

Applicant has not exceeded the PM PAL in PAL6. The ALJs reached the proper conclusion that based on TCEQ policy and guidance in effect when PAL6 was issued, cooling tower PM emissions were not in the PM baseline emission calculation used to establish the PM PAL.[56] In accordance with prescribed monitoring and reporting requirements for PAL6 compliance determinations, the compliance demonstrations for the PM PAL do not include cooling tower PM emissions.[57]

Protestants argue that the PM PAL must cover existing cooling tower emissions at BOP and that cooling tower PM emissions must be evaluated to determine whether Applicant is in compliance with the PM PAL in PAL6, which relates to whether the Application is a minor NSR application.[58] These arguments are not new[59] and were evaluated and addressed by the ALJs.[60]

As discussed in greater detail below, PAL6 was issued in 2005 before TCEQ adopted PAL-specific rules in 30 Texas Administrative Code ("***TAC***") Chapter 116. Thus, 30 TAC § 116.186, which Protestants repeatedly cite, did not exist when PAL6 was issued and did not apply to establishment of pollutant-specific PALs in PAL6.[61] However, even if § 116.186 applies to PAL6, the cooling tower PM emissions are not emissions from a "facility under the PAL" within the meaning of 30 TAC § 116.186(a)[62] because the evidence in the record establishes that consistent with TCEQ policy at the time, the cooling tower PM emissions were not included in the baseline for the PM PAL in PAL6.[63] As a result, the PAL6 compliance demonstrations necessarily do not include the cooling tower PM emissions.[64] The ALJs' PFD

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56 PFD at 22.
57 PFD at 22.
58 Exceptions at 13.
59 Protestants' Closing Argument at 14; Applicant's Closing Argument at 9; Applicant's Reply to Closing Argument at 6-7.
60 PFD at 21-21; Proposed Order at 13, Findings of Fact Nos. 93-94.
61 PFD at 8.
62 PFD at 15-16.
63 EM-300 at 27 (Brewer direct); ED-36 at 695 (Executive Director's Response to Comments, Response 2).
64 EM-300 at 14 (Brewer direct).

reflects a thoughtful assessment of the development of PAL6 and rules applicable to PALs, and demonstrates that the ALJs' findings are supported in the record: PAL6 does not include PM emissions from the cooling towers and is consistent with 30 TAC § 116.186(a).[65]

b. PAL6 was issued in compliance with TCEQ guidance in 2005.

The ALJs correctly determined that based upon TCEQ policy and guidance in effect when PAL6 was issued in 2005, cooling tower PM emissions were not included in the PM baseline emission calculation used to establish the PM PAL.[66] The ALJs also correctly concluded that TCEQ is to be given latitude in the methods it uses to accomplish its regulatory function.[67]

Protestants' arguments about the agency's application of its cooling tower PM guidance in a permit issued eight years ago constitute a collateral attack on PAL6.[68] The TCEQ through its Executive Director has discretion to apply guidance and make determinations in the process of issuing permits.[69] The Executive Director issued PAL6 consistent with the common practice of not including cooling tower emissions.[70] Moreover, Protestants did not introduce any evidence for their contention that the policy regarding cooling tower PM emissions did not apply to PAL permits. The Commissioners should therefore dismiss Protestants' arguments about the guidance used in a prior permit proceeding.

c. PAL semi-annual reports ("*SARs*") are the applicable method for evaluating PAL compliance.

Based on the entirety of record evidence, the ALJs correctly concluded that Applicant's SARs, rather than the AEIUs, are the prescribed means to determine compliance with Applicant's PAL6.[71]

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65 PFD at 22.

66 PFD at 22; Protestants' Closing Argument at 14; Protestants' Reply to Closing Argument at 15-16; Applicant's Closing Argument at 9-10; Applicant's Reply to Closing Argument at 6-7.

67 PFD at 22.

68 PFD at 21.

69 PFD at 19.

70 ED-36 at 965 (Executive Director's Response to Comments, Response 2); ED-18 at 17 (Virr).

71 PFD at 22; Protestants' Closing Argument at 12-16; Protestants' Reply to Closing Argument at 15-16; Applicant's Closing Argument at 8-9; Applicant's Reply to Closing Argument at 12-15.

Protestants again attempt to suggest that the AEIUs can be used as an acceptable substitute for SARs based on a theoretical but undemonstrated "equivalency" and that the AEIUs are "reliable indicators" of a PAL exceedance.[72] Based on this possibility, the Protestants would have the Commission reject the ALJs' evidentiary assessment and leap to the conclusion that PM emissions have exceeded the PM PAL in PAL6.[73]

Protestants focus solely on attempts to discredit Applicant's and the Executive Director's evidence[74] in hopes of distracting the Commission away from the fact that they offered *no evidence* to refute the applicability or validity of eight years of SARs submitted by Applicant for PAL6. Without specific numbers to describe any equivalency or to make a meaningful comparison between AEIUs and SARs relating to PAL compliance, the record remains empty of support for Protestants' contention.[75] The ALJs did not "simply presume"[76] that the AEIUs do not reliably indicate PM emission levels; rather, the ALJs based their conclusions on evidence in the record. The emissions reported in the AEIUs are based on different emission sources, monitoring and calculation methods than those required for PAL6 compliance demonstrations.[77] The SARs remain unrefuted evidence in the record, and clearly support the ALJs' conclusion that SARs are the only method of evaluating PAL compliance.[78]

Without any specific evidence indicating an inaccuracy, Protestants question the veracity of Applicant's emissions data."[79] The ALJs did not find Protestants' arguments in support of using AEIUs as an indication of PAL compliance or noncompliance persuasive in light of the evidence detailing the PAL monitoring, recordkeeping and reporting compliance requirements.[80] The ALJs were free to give weight to evidence as they deemed appropriate.[81] The ALJs

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72 Exceptions at 15.
73 Exceptions at 15-16.
74 Exceptions at 16-17.
75 PFD at 12.
76 Exceptions at 16.
77 PFD at 21.
78 PFD at 21-22; *see also* EM-305 at 40, 45 (40 C.F.R. §§ 52.21(aa)(7)(ix), 52.21(aa)(14)(i)); EM-300 at 42-47 (Brewer prefiled).
79 Exceptions at 16.
80 PFD at 21-22.
81 *See Tex. Dep't of Pub. Safety v. Raffaelli*, 905 S.W.2d 773, 778 (Tex.App.-Texarkana 1995, no writ)(ALJ is sole judge of the weight of the evidence); *Granek v. Tex. Bd. of Med. Exam.*, 172 S.W.3d 761, 778-79 (Tex. App. -- Austin, 2005, no pet.) *citing Southern Union Gas Co. v. Railroad Comm'n*, 692 S.W.2d 137, 141-42 (Tex.App.-Austin 1985, writ ref'd n.r.e.)(In a contested case hearing, ALJ is sole judge of witness credibility and is free to

considered the evidence in the record as a whole and concluded that for determining PAL compliance, the AEIUs are not accurate or representative and the SARs are the required and appropriate benchmark for evaluating compliance with the PM PAL.[82]

Because Protestants have no evidence of noncompliance, Protestants go even further and boldly accuse the Executive Director of incomplete discovery responses months after discovery has ended.[83] Protestants had an opportunity to challenge the sufficiency of a discovery answer if they were not satisfied with the way the Executive Director responded to the request.[84] Protestants made no such motion during the discovery phase of this case and cannot now complain in post-hearing briefing.[85] Pursuant to the terms of the ALJs' scheduling order, late complaints raising discovery objections and questioning the sufficiency of the Executive Director's response to their discovery requests have already been waived.

The Commission should reject Protestants' suggestions that AEIUs may be used to evaluate compliance with a PAL permit. Applicant demonstrated compliance with PAL6 through SARs submitted under the terms and conditions of PAL6, and the ALJs properly concluded that all such demonstrations for the past eight years have shown compliance with the PM PAL.[86]

d. The ALJs considered Mr. Virr's testimony.

The ALJs properly concluded Applicant has complied with all PALs in PAL6 since TCEQ issued the permit in 2005.[87] Protestants grasp at straws to argue that the Commission should selectively rely on Kyle Virr's deposition testimony regarding the AEIUs to determine

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accept or reject testimony of any witness or even accept "part of the testimony of one witness and disregard the remainder").

82 PFD at 21-22.

83 *See* Exceptions at 18 (Protestants claim without merit that the Executive Director's response to a request for admission does not support the ALJs' finding in the PFD that the AEIUs are less reliable than the SARs for PM PAL compliance; Protestants also attempt to argue that the ALJ should not rely on the Executive Director's interrogatory response concluding in the PFD that combined PM emissions from all facilities at BOP have not exceeded the PM PAL limit.)

84 *See* TEX. R. CIV. P. 215.4(a).

85 Pursuant to Order No. 2 signed July 16, 2013, all discovery concluded September 16, 2013. The ALJs ordered that significant disputes which cannot be resolved should be brought to the ALJs' attention is in a motion to compel. Protestants did not raise a single complaint about discovery responses to the ALJs.

86 PFD at 22.

87 PFD at 22; Protestants' Closing Argument at 12-16; Protestants' Reply to Closing Argument at 15-16; Applicant's Closing Argument at 8-9; Applicant's Reply to Closing Argument at 12-15.

that a "preponderance" of evidence demonstrates that total PM emissions from BOP exceed the PM PAL.[88]

The ALJs evaluated all of Mr. Virr's testimony regarding AEIUs and included an exchange from Mr. Virr's testimony in the PFD where Mr. Virr explained that AEIUs are not used to determine compliance with the PAL.[89] Although the Protestants do not include this exchange in their Exceptions, the PFD[90] and the Applicant's Reply to Closing Arguments[91] each address Mr. Virr's testimony that SARs are used to determine compliance with PAL limits.[92]

The ALJs appropriately weighed all evidence in the record. Protestants' arguments are without merit. The Commission should, therefore, confidently adopt the ALJs' findings and conclusions which are based on a careful weighing of probative evidence.

e. Protestants' collateral attacks on TCEQ's final PAL6 permit in this proceeding are impermissible.

The ALJs evaluated Protestants' repeated collateral attacks on PAL6 on more than one occasion.[93] In each consideration, the ALJs listened to the parties' arguments and, consistent with the evidentiary record and applicable legal precedent, correctly concluded that the Protestants' attacks are impermissible. The ALJs found that PAL6 was issued based on the agency's interpretations of its own statutes and rules; TCEQ permits remain valid unless the agency revokes the permit or a court determines in an independent proceeding that the permit is invalid; and that PAL6 as a final order of the TCEQ is not subject to collateral attack in this administrative proceeding.[94]

Protestants argue that the PFD misconstrues their argument as a collateral attack on the validity of a permit limit.[95] They say that Applicant calculated baseline emissions for PAL6, the

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88 Exceptions at 19, citing SC-106 at 35-36.
89 PFD at 12.
90 PFD at 12.
91 Applicants Reply to Closing Argument at 13.
92 SC-101 at 101.
93 *See* PFD at 21-22, 30, 33; Tr. at 10-11; Protestants' Closing Argument at 32-33; Applicant's Reply to Closing Argument at 32-33.
94 PFD at 22.
95 Exceptions at 19.

company must now "live with its permit limit," and that Applicant's pending application to alter the PM PAL to include cooling tower emissions has not been approved by the TCEQ.[96]

Applicant has consistently stated throughout this proceeding its commitment to take necessary steps in utilizing the operational flexibility of its PAL permit to comply with the PALs and all permit conditions in PAL6.[97] This necessarily includes compliance with the specific and detailed provisions that dictate the method for compliance demonstrations for the PALs.[98] The relevant question relating to the current permit application before the ALJs is whether Applicant showed that it can operate the proposed EPU within the PALs. The Executive Director and the ALJs agreed that based on Applicant's representations in the record, it can operate the EPU and continue to comply with PAL6.[99]

The Commissioners should reject Protestants' arguments because they are beyond the scope of this proceeding. Applicant is obligated to comply with PAL6 as it is written and as it was established in 2005 and has demonstrated that it has been in compliance with PAL6 since it was issued. Applicant has also demonstrated in the evidentiary record and through its enforceable permit representations that it can operate the proposed EPU within the PALs. Nothing the Protestants have introduced refutes this demonstration. Applicant can and should be able to rely on PAL6 to evaluate PM in this permit proceeding in the context of a minor NSR application.

3. PAL6 is a federal PAL issued under Texas' State Implementation Plan ("*SIP*")–approved rules.

The ALJs' determination that PAL6 is a valid federal PAL is supported by more than a preponderance of the evidence in the record. Specifically, the ALJs state in the PFD that "TCEQ had the authority to issue PAL6 as a federal PAL in 2005," and "[s]tates' authority to issue PALs

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[96] Exceptions at 20. The pending regulatory action is not related to this permit application. *See* Applicant's Reply to Closing Argument at 16-17 (explaining that in a separate action unrelated to the EPU application at issue in this proceeding, TCEQ is considering whether the Cooling Tower PM emissions should be added to the PM PAL as a more accurate representation of the PM PAL baseline calculation) citing EM-305 at 41 (40 C.F.R. § 52.21(aa)(8)(ii)(a)(l)(2005)); EM-306 at 11 (30 TEX. ADMIN. CODE § 116.192(c)(l)(A)(2012)) as regulatory support for the PAL evaluation.

[97] EM-300 at 15-16; 50-53.

[98] EM-302 (PAL6), Special Condition 23; EM-300 at 14-45.

[99] PFD at 21-22.

under existing regulations was not cut off when EPA promulgated the 2002 Final PAL Rules."[100] In response, Protestants reiterate arguments that have already been addressed in Applicant's Closing Argument and the PFD. The Commission should reject the Protestants' Exceptions that PAL6 was not issued pursuant to the Commission's SIP-approved rules.[101] The ALJs' conclusions are correct as demonstrated in the following ways:

- The record demonstrates TCEQ had the authority to issue PAL6 as a federal PAL in 2005.
- The 2002 Final PAL Rule recognize States' ability to continue issuing PALs under existing federal regulations.
- PAL6 was issued pursuant to the TCEQ's NSR rules located in 30 TAC Chapter 116, Subchapter B ("Subchapter B").

Protestants' arguments to the contrary, as explained below, have been addressed by the Applicant's Closing Argument, the Applicant's Reply and by the Executive Director. Thus, the Commission should reject the Protestants' Exceptions and adopt the ALJs' PFD and Proposed Order.

a. The record demonstrates TCEQ had the authority to issue PAL6 for federal applicability decisions in 2005.

As the ALJs noted, TCEQ had the authority to issue PAL6 for federal applicability decisions in 2005.[102] Applicant's Closing Argument and Applicant's Reply explain that the plain language in EPA's 1996 PAL Proposal and 2002 Final PAL Rule describe how states were implementing PALs based upon the authority provided in the federal regulations that pre-existed the 2002 Final PAL Rules.[103] Consistent with the EPA discussion in the PAL regulatory preambles, the Executive Director used the authority under Texas SIP-approved rules, together with the permitting authority granted to the agency under the Texas Clean Air Act, to issue

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[100] PFD at 43.
[101] Exceptions at 22-26.
[102] PFD at 43.
[103] *See* Applicant's Closing Argument at 16 – 20 (citing *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR); Notice of Proposed Rulemaking,* 61 Fed. Reg. at 38250, 38264 (July 23, 1996) (the ***"1996 PAL Proposal"***); EM-304 at 57 (2002 Final PAL Rule, 67 Fed. Reg. at 80241/2)).; *see also* Applicant's Reply to Closing Argument at 27 -- 30.

PAL6 in 2005.[104] Despite the recognized federal authority for states to issue PALs, Protestants' Exceptions continue to attack the validity of PAL6 because it was issued prior to the Texas' SIP-approved PAL rules.[105]

Protestants assert that a minor statement in TCEQ's response to comments in the preamble to the proposed state PAL rules in 2006 somehow invalidated PALs already issued by the agency.[106] Additional evaluation of the response reveals it meant much less. In short, EPA had commented that the proposed PAL permit alteration and amendment provisions in 30 TAC § 116.192 must be consistent with the already existing SIP-approved amendment provisions in 30 TAC § 116.116 (Changes to Facilities); and TCEQ responded that "[a] PAL permit does not authorize facilities that emit air contaminants and is not subject to those requirements."[107] From this statement, Protestants argue that the TCEQ's Subchapter B Rules could not be used to alter or amend PALs and, as such, could not be used to establish PALs. This argument fails for the reasons outline below.

Protestants' argument fails because TCEQ had the authority to issue PAL6 as a federal PAL irrespective of the 2006 proposed PAL rules or any comments made therein. Despite Protestants' repeated attempts to tie PAL6 to the SIP-disapproved 2006 PAL rules, the fact remains that PAL6 was not issued pursuant to those rules. This fact was fully recognized by Protestants' witness.

TCEQ's response to EPA also highlights the distinction between a PAL applicability limit and air emission authorizations under traditional NSR review. As stated throughout the record, a PAL does not authorize a facility to emit air pollutants like a traditional NSR permit; rather, it establishes a 12-month emissions level below which new and modified facilities or

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[104] SC-103 at 3 (Executive Director's Responses to Protestants Written Discovery Requests, Response to Interrogatory No. 3, citing EPA *Technical Support Document for the Prevention of Significant Deterioration and Nonattainment Area for New Source Review Regulations (**"TSD"**)* at 1-7-33 ("nothing in the final rules specifically precludes reviewing authorities from issuing PAL like permits under the existing regulations during the period prior to the adoption of any new PAL provisions into the State major NSR program"); *see also* ED-18 at 473; TEX. HEALTH AND SAFETY CODE §§ 382.051(a)(1),(b)(11) (Vernon 2010).

[105] Exceptions at 22-23.

[106] Exceptions at 23.

[107] 31 Tex. Reg. 528 (Jan. 27, 2006).

emissions units at a site will not be subject to major new source review for that pollutant.[108] Therefore, a PAL will not, and should not, be altered or amended in the same manner as a traditional NSR permit.

Thus, Protestants' last minute effort to cast doubt on TCEQ's authority to establish PAL6 fails. TCEQ's authority for establishing PALs was in place well before the proposed 2006 PAL rules and imbedded in the then SIP-approved Subchapter B Rules. As described by EPA in the proposed PAL rules and cited by the ALJs,[109] states had discretion as far back as 1996 to implement PAL-like permits under the existing federal regulations:

> Although a source-by-source PAL approach may be implemented in many situations *under the current regulations,* several PAL related issues are not clearly addressed by the current regulations, policies, or practice. The EPA believes that regulatory changes would allow for more ease, clarity and certainty in the implementation of a PAL approach. Accordingly, the EPA proposes to define PAL and PAL major modification.[110]

Thus, the Commission should reject Protestants' arguments and accept the ALJs' conclusion that TCEQ had the authority to issue PAL6 as a federal PAL in 2005.

b. The 2002 Final PAL Rule left states with the authority to continue issuing PALs under existing federal regulations.

Protestants restate their Closing Argument[111] to erroneously argue that TCEQ lacked authority to issue PAL6 in 2005 without EPA approval. Protestants assert in their Exceptions[112] that Applicant and the ALJs misread the following 2002 Final PAL technical support language which was cited by the Executive Director in support of TCEQ's ability to issue PAL permits prior to adoption of the SIP-approved PAL program:

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[108] *See* SC-103 at 6 (Executive Director's Responses to Written Discovery Requests, Interrogatory No. 8); ED-36 at 13 (Executive Director's Response to Public Comments, Response 3).
[109] *See* PFD at 39-40.
[110] *See* 1996 PAL Proposal, 61 Fed. Reg. at 38264 (July 23, 1996) (Applicant's Closing Argument, Attachment 7).
[111] Protestants' Closing Argument at 29-31.
[112] *See* Exceptions at 24.

> Nothing in the final rules specifically precludes reviewing authorities from issuing PAL like permits under the existing regulations during the period prior to the adoption of any new PAL provisions into the State major NSR program.[113]

The ALJ and the Applicant appropriately relied on TCEQ's response. In addition, despite having the opportunity to question TCEQ's witness on the above statement, Protestants did not question TCEQ's witness, did not enter the cited document into the record, and are now collaterally attacking PAL6 based on their own erroneous and misleading interpretation of the rulemaking language.

Contrary to Protestants' assertion, the Protestants fail to point to any language where EPA "determined that states must adopt the PAL provisions contained in its final rules.[114] Protestant's refer to a quote in an attempt to imply that EPA is "requiring that States adopt the PAL provisions contained in the final rules."[115] However, Protestants conveniently omit the last two sentences of the quote, which provide that once the final PAL rules are promulgated, states must demonstrate that any alternative program is "at least as stringent as or more stringent than the PAL provisions of the final rules," and that "existing PAL programs need not be changed, provided that they are at least equivalent to the final rules."[116] This same language was included in the Final 2002 PAL Rule and provides states with the option of using existing regulations to establish PALs before adopting specific PAL provisions in the state SIP.[117] Thus, the ALJs correctly concluded that states' authority to issue PALs was not cut off when EPA promulgated the 2002 Final PAL Rule.

Next, Protestants attempt to argue that to preamble language in the 2002 Final Rule recognizing state's authority to issue PALs before PAL-specific rules were adopted had nothing to do with PALs.[118] This passage is as follows:

> If a State decides it does not want to implement any of the new applicability provisions, that State will need to show that its existing program is at least as stringent as our revised base program.[119]

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[113] *See* SC-103 at 4 (Executive Director's Responses to Protestants' Written Discovery Requests, Response to Interrogatory No. 3) citing TSD at 1-7-33.
[114] Exceptions at 24.
[115] Exceptions at 24 citing TSD at 1-7-33.
[116] TSD at 1-7-33.
[117] EM-304 at 57 (2002 Final PAL Rule, 67 Fed. Reg. at 80241/2).
[118] Exceptions at 25.

According to Protestants, the phrase "applicability provisions" does not refer to PALs but refers to other elements of the 2002 rulemaking, *i.e.*, "actual-to-projected –actual" applicability test for existing units, "actual-to-potential" test for any new unit, Clean Units, and hybrid tests.[120] Protestants are wrong again. The 2002 Final PAL Rule preamble *specifically* refers to PALs when discussing "applicability provisions." In its introduction of the PAL, after rejecting the proposed potential-to-potential approach for determining major modification, the EPA stated, "[t]herefore, we are promulgating two new *applicability provisions* that capture the benefits of a potential-to-potential approach but still have the necessary safeguards to ensure environmental protection –*PALs*, and Clean Unit Tests."[121] Furthermore, in referring to the five changes that were being made to the NSR program under the new rulemaking, EPA stated, "[t]hese elements include baseline actual emissions, actual-to-projected-actual emissions methodology, *PALs*, Clean Units, and PCPs.[122] Additionally, EPA explained that "the NSR program will work better as a practical matter . . . if all five of the *new applicability provisions* are adopted and implemented.[123] Thus, the ALJs rightly concluded that the "State had authority to implement PALs using their existing regulations so long as those regulations were as stringent as the federal 2002 Final PAL Rules.[124]

c. PAL6 was issued pursuant to the Subchapter B Rules.

In addition to their implausible argument that ExxonMobil's 2005 PAL6 permit was issued under TCEQ's 2006 PAL rules,[125] the Protestants now assert that the PAL6 was issued pursuant to TCEQ's 30 TAC Chapter 116, Subchapter G rules relating to flexible permits.[126] Regardless of the argument asserted by Protestants, the answer regarding TCEQ's authority to issue PAL6 in 2005 remains the same: as described by the ALJs' PFD, EPA recognized that states had the authority to issue PAL-like permits as long as the PALs were as stringent as the 2002 PAL rules.[127]

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[119] EM-304 at 57 (2002 Final PAL Rule, 67 Fed. Reg. at 80241/2).
[120] *See* Exceptions at 25.
[121] *See* 67 Fed. Reg. 80206/1 (emphasis added).
[122] *Id.* at 80189/1.
[123] *Id.* at 80241/1.
[124] PFD at 43-44.
[125] *See* Protestants' Closing Argument at 28-29; SC-100 at 21-23.
[126] Exceptions at 26.
[127] PFD at 43-45; EM-304 at 57 (2002 Final PAL Rule, 67 Fed. Reg. at 80241/2).

PAL6 was issued pursuant to 30 TAC Chapter 116, Subchapter B Rules consistently with the preamble to the 2002 Final PAL Rule.[128] As noted by Applicant's permitting expert, "the application letter and the issuance letter from TCEQ made it clear that the [PAL6] was being issued under 30 Texas Administrative Code Subchapter B."[129]

TCEQ is allowed to have more than one permit type in a document. Applicant's permit expert explained that Permit 3452 /PAL6 contains two types of authorizations: Permit 3452 contains a NSR construction air permit, which authorizes emissions for stationary sources, and PAL6 is an emissions limit used for federal applicability determinations.[130] That Permit 3452 is referred to as a flexible permit does not validate Protestants' assertion that PAL6 was issued under Subchapter G, flexible permit rules. As TCEQ noted, PALs are generally issued to existing facilities, as is the case of PAL6, which was incorporated into flexible permit 3452.

The ALJs' determination that PAL6 is a federal PAL and that TCEQ had the authority to issue PAL6 as a PAL for federal applicability determinations in 2005 is supported by more than a preponderance of the evidence in the record. Protestants' Exceptions are a recitation of old arguments that have been rejected by the ALJs. The Commission should adopt the ALJs' conclusion that TCEQ had the authority to issue PAL6 as a federal PAL in 2005.

B. EMISSIONS FROM THE PROPOSED EPU WILL NOT CAUSE OR CONTRIBUTE TO A VIOLATION OF THE ANNUAL $PM_{2.5}$ NAAQS

Although the Protestants take exception to the ALJs' determination that the Applicant properly accounted for secondarily-formed $PM_{2.5}$ in the Applicant's annual $PM_{2.5}$ NAAQS analysis, the only support that the Protestants offer for their position are unsupported conclusory statements and a reference to unspecified modeling guidance.[131] Since the Protestants have stated no basis for their position that secondary $PM_{2.5}$ should have been considered in the annual $PM_{2.5}$ NAAQS demonstration, their objection is meritless on its face.

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[128] Tr. at 115-116, 124-125, 131 (Brewer on redirect).
[129] *Id.* at 115-116.
[130] EM-300 at 6 (Brewer pre-filed).
[131] Exceptions at 27-28.

Even presuming that the Protestants' protest to the ALJs' determination is a regurgitation of the position that the Protestants took in their Closing Argument,[132] their complaint is unfounded. As fully explained in the PFD and supported by the evidentiary record,[133] the relevant EPA guidance issued on March 13, 2013 requires consideration of secondary $PM_{2.5}$ only if an application is subject to major NSR.[134] The PFD clearly explains that because the Application in this case is not subject to major NSR, it "would not have been appropriate for Applicant's annual $PM_{2.5}$ NAAQS demonstration to consider secondary $PM_{2.5}$."[135] The ALJs fully explained their reasoning and basis for concluding that the evaluation of the annual $PM_{2.5}$ NAAQS was appropriate, and the Protestants have offered nothing new.

C. EMISSIONS FROM THE PROPOSED EPU WILL NOT CAUSE OR CONTRIBUTE TO A VIOLATION OF THE OZONE NAAQS

Although the Protestants take exception to the ALJs' conclusions that a source-specific demonstration relating to the ozone NAAQS should have been required and that the proposed EPU will not cause or contribute to an exceedance of the ozone NAAQS, the Protestants offer only conclusory statements, but no other basis for their position.[136]

Presuming that the Protestants' exception to the ALJs' determination is a regurgitation of the position that the Protestants took in their Closing Argument,[137] the Protestants' exception is unfounded. As fully explained in the PFD and supported by the evidentiary record:[138]

> Nothing in the record supports Protestants' assertions that ozone modeling . . . should have been required as a condition of approval for the Application. Thus, the evidentiary record reflects that the Application properly takes ozone impacts into account.[139]

The ALJs fully explained their reasoning and basis for concluding that the Application properly takes ozone impacts into account, and the Protestants have offered nothing new.

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[132] Protestants' Closing Argument at 36-38.
[133] PFD at 60-62.
[134] ED-15 at 365 (EPA guidance regarding $PM_{2.5}$ SILs, II.1 *Significant Emissions Rate*, March 13, 2013).
[135] PFD at 61.
[136] Exceptions at 28.
[137] Protestants' Closing Argument at 38-42.
[138] PFD at 62-67.
[139] PFD at 67.

D. CERTAIN PLANNED MSS ACTIVITIES ARE APPROPRIATELY AUTHORIZED UNDER PERMIT NO. 3452

The Protestants take exception to the ALJs' determination that certain planned Maintenance, Startup, and Shutdown ("***MSS***") activities are authorized under Permit No. 3452/PAL6, and cite to their Closing Argument and Response to Closing Argument for support.[140] Thus, the Protestants have offered nothing new. The ALJs fully explained their reasoning and basis for concluding that where appropriate, certain planned MSS activities are included in Permit No. 3452 or will be properly authorized when the final permit is issued.[141]

II. CONCLUSION AND PRAYER

For the reasons stated herein, Applicant agrees with the ALJs' PFD and Proposed Order, and prays that the ALJs clarify the ALJs' Proposed Order as requested in the Applicant's Exceptions and the Executive Director's Exceptions. The issues raised in the Protestants' Exceptions do not raise any issues that have not already been fully considered by the ALJs, and the Protestant's Exceptions do not provide any reason why the ALJs' PFD or Proposed Order should be changed.

Applicant further prays that in accordance with proposed Ordering Provision Nos. 1 and 3, the Commission issue Air Quality Permit No. 102982 to be effective on the date that the Commission issues its Order.

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[140] Exceptions at 28.
[141] PFD at 73-78.

CERTIFICATE OF SERVICE

I certify that I have served true and correct copies of ExxonMobil's Replies to the Exceptions to the Proposal for Decision on the Administrative Law Judges and the parties to this matter as identified below, on this the 17th day of January, 2014.

Derek Seal

Gabriel Clark-Leach (electronically and regular mail)
Environmental Integrity Project
1303 San Antonio St., #200
Austin, Texas 78701
Telephone: 512.637.9477
Facsimile: 512.584.8019
(gclark-leach@environmentalintegrity.org)

Alexis Lorick (electronically and regular mail)
TCEQ Office of Legal Services, MC-173
12100 Park 35 Circle, Building A
Austin, Texas 78753
Telephone: 512.239.0649
Facsimile: 512.239.0606
(alexis.lorick@tceq.texas.gov)

Eli Martinez (electronically and regular mail)
TCEQ Office of Public Interest Counsel, MC-103
12100 Park 35 Circle, Building F
Austin, Texas 78753
Telephone: 512.239.3974
Facsimile: 512.239.6377
(eli.martinez@tceq.texas.gov)

Anne Idsal (via facsimile and regular mail)
General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087
Telephone: 512-239-5525
Facsimile: 512-239-5533